No. 91-1826

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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the district courts properly entertain these lawsuits brought by aliens seeking adjustment of status, which challenge the Immigration and Naturalization Service's regulations articulating the bases for granting and denying that relief, notwithstanding 8 U.S.C. 1255a(f), which provides a single exclusive means of review in the courts of appeals for denials of adjustment of status?

2. Does 8 U.S.C. 1255a, which requires all applications for adjustment of status to be filed before a specified deadline, bar the district courts from ordering the Immigration and Naturalization Service to extend that deadline?

PARTIES TO THE PROCEEDINGS

Respondents in the first case are Catholic Social Services, Inc.; National Center for Immigrant Rights, Inc.; United-California Mexican American Associations; American Federation of Labor-Congress of Industrial Organizations; United Farm Workers of America, AFL-CIO; La Communidad de San Juan; Sara Orantes de Palacios, Mercedes Aguilar de Lopez; Maria Teresa Reyes; Jose Guerroero Saravia; Efren Gonzales; Lorenza Sanchez Benuto; Carlos Alberto Medina; Benjamin Chavez; Sergio Will; Eva Garcia de Soto; and Petra Estrada de Vasquez.

Respondents in the second case are League of United Latin-American Citizens; American G.I. Forum; Hermandad Mexicana Nacional; Los Angeles County Federaltion [*sic*] of Labor, Legalization Assistance Project (AFL-CIO); United California Mexican-American Association; International Institute (San Francisco); John Doe; Raul Berumen-Flores; Martha Berumen; Mario Villa; and Martin Nava.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Attorney General and the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 956 F.2d 914. The opinions of the district courts (App. 22a-28a, 40a-49a, 50a-60a) are

unreported. A related opinion of the district court in the first case is reported at 685 F. Supp. 1149.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. 1255a is set out in the appendix (App. 99a-119a).

2. 5 U.S.C. 702, 703, and 704 are set out in the appendix (App. 120a-121a).

STATEMENT

1. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), Congress provided a one-time opportunity for thousands of aliens residing illegally in the United States to acquire legal residency, by permitting aliens to apply to INS to adjust their status to that of an alien lawfully admitted for temporary residence. See 8 U.S.C. 1255a. The statute set out a number of detailed substantive requirements for an alien to qualify for this special relief. Generally, these requirements limited relief to aliens who could establish (1) continuous unlawful residence in the United States since before January 1, 1982; (2) continuous physical presence in the United States since November 6, 1986 (the date IRCA was passed); and (3) admissibility to the United States as an immigrant. 8 U.S.C. 1255a(a)(2)-(4).

A key concern of IRCA was to ensure that the adjustment program proceeded in an expeditious manner. Accordingly, the fourth condition for eligibility,

set forth in Section 1255a(a)(1), limited relief to aliens who applied during a twelve-month period designated by the Attorney General, but starting no later than 180 days after November 6, 1986.[1] Section 1255a(f) also set forth detailed and exclusive provisions for judicial and administrative review of adjustment determinations. First, paragraph (1) of Section 1255a(f) provides that there "shall be no administrative or judicial review of a determination respecting an application for adjustment of status * * * except in accordance with this subsection." Second, paragraph (2) provides that there will be no review whatsoever for a denial "based on a late filing of an application." Third, paragraph (3) requires the Attorney General to establish procedures for "a single level of administrative appellate review."[2] Finally, paragraph (4) provides that judicial review will be available "only in the judicial review of an order of deportation under [8 U.S.C. 1105a]."[3]

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[1] The Attorney General designated the twelve-month application period to begin on the last day possible, May 5, 1987, continuing through May 4, 1988. 8 C.F.R. 245a.2(a)(1).

[2] The initial authority to evaluate applications has been delegated to the directors of INS's regional processing facilities. 8 C.F.R. 103.1(t). Pursuant to 8 C.F.R. 103.1(f)(1)(xxvii), 245a.2(p), the decision of the regional processing facility may be appealed within thirty days to the Associate Commissioner, Examinations (Administrative Appeals Unit).

[3] Pursuant to 8 C.F.R. 242.8(a), the initial authority to determine deportability lies with immigration judges. The alien may appeal to the Board of Immigration Appeals under 8 C.F.R. 242.21. Finally, under 8 U.S.C. 1105a, the alien may appeal the decision of the Board of Immigration Appeals to the appropriate regional court of appeals, in accordance with the provisions of 28 U.S.C. 2342-2350. See 8 U.S.C. 1105a

2. This petition involves two consolidated cases challenging two different INS regulations interpreting the statutory requirements for eligibility for adjustment of status.

a. The first case involves Section 1255a(a)(3), which provides that an alien generally is not eligible for adjustment under IRCA unless he has remained in this country continuously since November 6, 1986. Section 1255a(a)(3)(B) mitigates this requirement somewhat by providing that an alien shall not be considered to have failed to maintain continuous physical presence in the United States solely because of "brief, casual, and innocent absences from the United States." Shortly after IRCA was passed, INS interpreted this provision to exclude any absences that were not authorized by INS in advance. See 52 Fed. Reg. 16,208-16,209 (1987) (codified at 8 C.F.R. 245a.1(g)).

In November 1986, respondents Catholic Social Services, Inc. and other organizations and individuals commenced an action in the United States District Court for the Eastern District of California. The district court certified a class of aliens consisting of all persons who (a) would be eligible for legalization under Section 1255a except for having been absent from the United States without INS's advance permission, and (b) assert that the absence was brief, casual, and innocent. In May 1988, the district court granted summary judgment to respondents and enjoined INS from enforcing its administrative interpretation. *Catholic Social Services, Inc.* v. *Meese*, 685 F. Supp. 1149 (1988). Turning to remedial issues, the court issued

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(incorporating the provisions of 28 U.S.C. 2342-2350 by reference).

an opinion on June 10, 1988 requiring INS to ignore the statutory cutoff for acceptance of applications. INS was ordered—through November 30, 1988—to accept adjustment applications from class members who claimed that INS's interpretation of the "brief, casual, and innocent absences" provision had deterred them from filing applications in a timely manner. App. 22a-28a.[4]

In response to this Court's June 17, 1988 decision in *INS* v. *Pangilinan*, 486 U.S. 875, the government filed a motion to vacate that portion of the district court's decision extending the filing deadline established by Congress. After further briefing, the district court denied the motion. App. 40a-49a. Expressing the view that it "would negate the entire purpose of equity" to require a court sitting in equity to "conform its decisions to the strictures of the statute," *id.* at 42a n.2, the court concluded that it had power to extend the statutorily imposed deadline. Although it "recognize[d] that there is dicta in [*Pangilinan*] which might suggest that the court is powerless to remedy the harm caused by [INS's] violation of the statute," it nevertheless decided to "rea[d] the holdings of *Pangilinan* narrowly and as limited by the particular factual and statutory context in which that case arose." *Id.* at 42a.

b. The second case concerns Section 1255a(a)(2), which provides that an alien is not eligible for relief under IRCA unless he has resided continuously in this country in an unlawful status since before January 1, 1982. INS interpreted this section to mean that an

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[4] The court issued a supplemental order on August 11, 1988 (App. 29a-33a) requiring INS to advise individuals in its custody of any rights they might have under the district court's prior orders.

alien who left the United States and then reentered using a fraudulent but facially valid nonimmigrant visa or other documentation was not eligible for relief, because the use of facially valid documentation made the subsequent residence lawful for purposes of this section of IRCA. See 8 C.F.R. 245a.2(b)(8).[5]

In July 1987, respondents League of United Latin American Citizens and various individuals brought an action challenging the regulation in the United States District Court for the Central District of California. Although INS withdrew the challenged regulation in October 1987,[6] the suit continued, and the district court held in July 1988 that the original INS policy had been invalid. See App. 8a-9a. Finally, in August 1988 the court issued a remedial order requiring INS to continue until November 30, 1988 to accept applications for relief from aliens who claimed that they would have applied for relief in a timely manner but for INS's interpretation of the "continuous unlawful residence" provision. App. 50a-60a. Like the district court in the *CSS* case, the court rejected the government's reliance on *Pangilinan*. See App. 57a-58a.

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[5] On its face, 8 C.F.R. 245a.2(b)(8) states that an alien will remain eligible for relief as long as his reentry was "not documented on Service Form I-94, Arrival-Departure Record." This has the effect of barring relief for aliens who entered with facially valid documents, because their entry would have been documented on an I-94.

[6] INS altered the regulations by issuing 8 C.F.R. 245a.2(b)(9) and (10). Subparagraph (9) provides that an alien is eligible for relief even if his entry is noted on the I-94, but subparagraph (10) conditions this on the alien's securing a waiver of the provision in 8 U.S.C. 1182(a)(19) that requires exclusion of aliens who enter the United States by fraud. See App. 8a-9a.

3. Although the government determined not to challenge the two district court rulings rejecting INS's interpretations of IRCA, it nevertheless appealed both cases to the Ninth Circuit. The appeals challenged the district court's authority to entertain the cases and to grant relief extending the statutory cutoff for filing applications.[7] Pursuant to an expedited scheduling order, oral argument in the *CSS* case was heard in November 1988.[8] The court of appeals did not render a decision for more than three years, until February 13, 1992.[9]

a. The court first rejected the government's argument that 8 U.S.C. 1255a(f) precluded district court jurisdiction over the two cases.[10] App. 10a-15a. The

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[7] After issuing three temporary stays in the *CSS* case, see App. 94a, 95a, 96a, the court of appeals issued an order on September 20, 1988 (App. 97a-98a) partially granting the government's motion for a stay pending appeal. The order incorporated by reference the terms of a stay issued by the *CSS* district court on June 24, see App. 34a-39a. By prohibiting INS from deporting class members, the order effectively bars INS from deporting any individual who submits to INS an application contending that he is entitled to relief, although it does allow INS to defer adjudication of the applications.

[8] The court subsequently consolidated the *LULAC* case with the *CSS* case and accepted briefs in the *LULAC* case without ordering further arguments.

[9] By this time, INS had received nearly 300,000 applications under the district court order extending the statutory deadlines, as extended by the stay order issued by the court of appeals. See note 7, *supra*; Declaration of James A. Puleo (attached to government's stay application in the Ninth Circuit), App. 83a.

[10] As the court of appeals noted, the district court in the *LULAC* case did not enter a separate judgment pursuant to Fed. R. Civ. P. 58. See App. 10a n.3. This Court's decision

court of appeals relied heavily on this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), which involved similar provisions of IRCA related to relief for agricultural workers. The court reasoned that *McNary* limited the effect of Section 1255a(f) to "denials of *individual* * * * applications," App. 12a. Because this case did not involve an individual application, but a class-wide challenge to the standards to be applied to individual applications, the court concluded that jurisdiction was available under *McNary*. *Id.* at 14a.

The court acknowledged that the District of Columbia Circuit's decision in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991), was in conflict with its determination. *Ayuda*, the Ninth Circuit noted, addressed the "same jurisdictional issue," but had read *McNary* to give Section 1255a(f) a much more preclusive effect—barring judicial review of any issues "that go to the heart of an applicant's claim," even if presented on a "class-wide" basis, as in this case. App. 15a (quoting *Ayuda*, 948 F.2d at 749). The court of appeals nevertheless "decline[d]" to "follow the D.C. Circuit's * * * decision." App. 14a.

b. With respect to the propriety of the judiciary's extending the application deadline, the court of appeals rejected the government's argument that this Court's decision in *Pangilinan* barred the district court from extending the application deadline. App. 15a-19a. In the Ninth Circuit's view, *Pangilinan* could be distinguished on several different grounds. *First*, that the remedy imposed here was not naturalization, but simply an order requiring INS to consider applications for adjustment of status, *id.* at 16a-17a; *second*, that, "in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress," App. 17a [11]; and *third*, that *Pangilinan* had been influenced by subsequent legislative developments indicating that Congress would not have approved of an extension of the deadline. The court noted contrasting circumstances in this case, where the comments of one Senator debating a subsequent statute suggested that Congress would have approved of a judicial extension of the deadline. App. 18a-19a.

c. Recognizing that the long delay in deciding the cases had allowed the initial time period set forth in the district courts' injunctions to expire, the court of appeals remanded the cases to the district courts to provide for a further extension of the application period, equivalent to the periods originally ordered. App. 19a.[12]

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in *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 386-388 (1978), though, establishes that the separate-judgment requirement can be waived. The court of appeals correctly concluded that the requirement in fact was waived in this case, because "both parties and the district court treated the injunction as the final decision in the case, and neither party objected to the taking of an appeal." App. 10a n.3. In any event, even if this requirement had not been waived, the court of appeals still would have had jurisdiction over the appeal in the *CSS* case, which adequately presents the questions raised by this petition.

[11] The court stated that the deadline at issue in *Pangilinan* had been part of the statute, and suggested that IRCA differed because "Congress did not provide a specific cutoff date for amnesty applications [in IRCA]." App. 18a.

[12] The government filed a motion (App. 61a-98a) for an order staying the government's obligation to continue accepting applications pending disposition of this petition, but the court of appeals instead stayed the mandate, leaving in place the existing stays, discussed in note 7, *supra*.

REASONS FOR GRANTING THE PETITION

The court of appeals has rendered an important decision that has a significant practical effect on INS's administration of the legalization program established by IRCA, in direct conflict with a recent decision of the Court of Appeals for the District of Columbia Circuit. In effect, the court of appeals has allowed respondents to secure relief in the district courts that requires INS to entertain applications for legal residency from over 300,000 aliens who failed to comply with the statutory deadline established by Congress. Under this order, INS has been required to continue accepting new applications for more than four years after the deadline.

This ruling directly contravenes the express provisions of IRCA in two respects. First, IRCA establishes a single avenue of administrative review, with judicial review limited to the courts of appeals. Second, IRCA bars the processing of any applications filed after the cutoff date. Not only does the decision run afoul of IRCA itself and create an enormous administrative burden on INS, the decision directly conflicts with a decision of the District of Columbia Circuit, represents an unwarranted expansion of this Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), and cannot be reconciled with the decision of this Court in *Pangilinan*. Review by this Court is therefore warranted.

1. a. The court of appeals' decision upsets the carefully delineated scheme for judicial review Congress set forth in IRCA. As summarized above, IRCA was designed to provide one certain path for litigation with respect to eligibility for adjustment of status. Allowing respondents to maintain these class actions in the district courts creates a second means

of judicial review that bypasses adjudication by the expert administrative agency and thus gives the individual members of the respondent classes a choice of forum clearly inconsistent with the statute.[13]

This Court's decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), does not require this result. *McNary* held only that Section 1255a(f)(1)'s preclusion of review of "a determination respecting an application for adjustment of status" does not bar "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications," 111 S. Ct. at 896. As the Court pointed out, if Section 1255a(f) barred the collateral challenge at issue in *McNary*, the plaintiffs "would not as a practical matter be able to obtain meaningful judicial review" of their claims. 111 S. Ct. at 898. Thus, "the well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action" weighed heavily in favor of allowing the case to proceed in district

[13] It is also apparent that the APA does not give respondents a cause of action to challenge the regulations even if Section 1255a(f)(1) does not itself bar review. Under 5 U.S.C. 704 of the APA, the only agency actions for which the APA grants a cause of action are those for which "there is no other adequate remedy in a court." Further, Section 702 of Title 5 limits APA review to individuals "adversely affected or aggrieved by agency action." As this Court explained in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177 (1990), "a regulation is not ordinarily considered the type of action 'ripe' for judicial review under the APA until * * * some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.* at 3190. This rule suggests that the members of the respondent class to whom INS has not yet applied the challenged regulations have no basis for suit; the organizations representing their interests can have no greater rights.

court. *Ibid.* Moreover, judicial review would have been impractical because IRCA limits judicial review to the administrative record, which would contain no evidence with respect to the types of claims brought in *McNary*. See *id.* at 896-897. Finally, because the claim in *McNary* was a collateral challenge to INS's procedures, rather than to the substantive standards under which INS evaluated applications, a decision accepting the challenge would not "have the effect of establishing [the plaintiffs'] entitlement to [relief under IRCA]." *Id.* at 898.

None of those facts is present here. First, the ruling here does establish the class members' entitlement to relief, at least as to the only substantive issue identified with respect to respondents' circumstances.[14] Indeed, the district court's order in the *CSS* case makes this clear: INS was directed to reopen and grant applications that previously had been denied on the basis of the agency's interpretation of eligibility criteria. App. 24a (requiring INS to "readjudicate such applications in a manner consistent with the court's order [rejecting INS's interpretation of IRCA]").

Second, the challenges to the regulations in issue here—unlike the claims in *McNary*—are unquestionably subject to "meaningful judicial review" under the procedures established by IRCA. In both cases respondents' claims amount to nothing more than contentions that INS applies incorrect standards in determining whether aliens are entitled to relief under

[14] See App. 5a (*CSS* order covers "aliens who were prima facie eligible for legalization except for an unauthorized absence from the United States"), 9a (*LULAC* class includes aliens "who qualified for legalization but were deemed ineligible for it under the original reentry policy").

IRCA.[15] Yet, a challenge to the agency's interpretation of statutory prerequisites for relief is among the most common types of challenges brought in the course of an administrative proceeding contesting an agency decision denying relief. See, *e.g.*, *Martinez-Montoya* v. *INS*, 904 F.2d 1018 (5th Cir. 1990) (court of appeals decision overturning INS decision denying adjustment of status based on an improper construction of IRCA). A challenge brought in that context benefits from the concrete factual setting that aids judicial resolution of such questions.[16] Moreover, permitting applicants to bypass the administrative review process prevented the Attorney General's designated authority—which has the primary responsibility for resolving such questions—from considering these central statutory issues.

Finally, the administrative record related to an applicant's adjustment of status application would provide an adequate basis for judicial review of respondents' claims that INS has misinterpreted the criteria for eligibility. Indeed, as noted above, such an administrative record would afford a specific factual setting that would aid judicial review of the claim.

In short, respondents readily could have awaited agency proceedings and challenged INS's regulations in deportation proceedings that would have been

[15] See App. 5a (*CSS* complaint sought "to bar the implementation of th[e challenged] regulation"), 8a (*LULAC* complaint "challeng[ed] the validity of the INS's fraudulent reentry regulation").

[16] See *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3190 (1990) ("a regulation is not ordinarily considered the type of action 'ripe' for judicial review under the APA until * * * some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him").

brought against them if they had been denied relief. If INS's interpretation of the eligibility requirements was upheld and the aliens were denied adjustment of status, that ruling would have been subject to review in the court of appeals. See 8 U.S.C. 1105a(a) (incorporating by reference the procedures for appellate review described in 28 U.S.C. 2342-2350).[17]

Thus, the presumption in favor of judicial review that was central to the Court's concerns in *McNary* has no applicability in this case. Rather, the real question in this case is whether respondents are entitled to an additional means of review beyond the one fashioned by Congress. On that question, the general rule is that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); see 5 U.S.C. 704 (Administra-

[17] It is worth noting that courts have concluded that the exclusivity of the review of deportation available under Section 1105a bars district court review not only of the final deportation order itself, but also of denials of relief that, like adjustment of status, would have the effect of barring deportation. See, *e.g.*, *Foti* v. *INS*, 375 U.S. 217, 220-232 (1963) (discretionary denials of relief in deportation proceedings); *Melendez* v. *Department of Justice*, 926 F.2d 211, 216 (2d Cir. 1991) (noting that court of appeals jurisdiction under Section 1105a is exclusive avenue for review of denials of asylum); *Kashani* v. *Nelson*, 793 F.2d 818, 822-828 (7th Cir.) (holding that district courts have no authority to entertain actions challenging denial of asylum), cert. denied, 479 U.S. 1006 (1986). In light of these cases, it would be all the more odd to conclude—in the face of the express preclusion of alternate forms of judicial review set forth in Section 1255a(f)(1)—that unsatisfied claimants for adjustment of status enjoy the capacity to select alternate fora.

tive Procedure Act provides for judicial review only in cases for which "there is no other adequate remedy in a court"). The court of appeals erred in reading *McNary* to contravene these well-settled principles.

b. The Ninth Circuit's decision squarely conflicts with that of the D.C. Circuit in *Ayuda, Inc.* v. *Thornburgh*, 948 F.2d 742 (1991). In *Ayuda*, the D.C. Circuit considered [18] the availability of district court actions to challenge an INS regulation interpreting another provision of IRCA. See *Ayuda*, 948 F.2d at 745-746 (explaining plaintiffs' contentions regarding the meaning of a provision limiting relief to aliens whose unlawful status was "known to the Government"). The court of appeals rejected Ayuda's argument that *McNary* required it to accept jurisdiction over any claim other than a claim challenging the denial of a single application, explaining that *McNary* "was instead drawing a distinction between collateral issues (which might normally be procedural) and those that go to the heart of an applicant's claim [or] seek * * * a declaration of what they believe is the proper statutory interpretation." *Id.* at 749 (citation and internal quotation marks omitted).

Because respondents' claims plainly "seek * * * a declaration of what they believe is the proper statutory interpretation," application of the *Ayuda* analysis in this case would have led to dismissal of these cases for lack of jurisdiction. The Ninth Circuit rec-

[18] The D.C. Circuit issued an earlier opinion finding jurisdiction improper in 1989, before this Court's decision in *McNary*. *Ayuda, Inc.* v. *Thornburgh*, 880 F.2d 1325. This Court granted the plaintiffs' petition for certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *McNary*. 111 S. Ct. 1068 (1991). The opinion discussed in the text was issued in response to this Court's remand order.

ognized this, but did not attempt to distinguish *Ayuda*. Rather, in response to the government's suggestion that the court "follow the D.C. Circuit's recent decision in *Ayuda*," the Ninth Circuit expressly rejected the reasoning of *Ayuda* and stated: "We decline to do so." App. 14a.[19] As a result, the class of aliens who claimed that their IRCA applications were denied improperly on the grounds that they were not "known to the government" can challenge that determination only in a deportation proceeding, and cannot obtain a judicial extension of the statutory deadline. By contrast, the aliens in these cases, who claim that their applications were, or would have been, improperly denied on the basis of the regulations at issue in these cases, have the option of choosing a district court forum. This Court should grant certiorari to resolve the conflict.

2. The Ninth Circuit's decision extending the statutory deadline for applications established by IRCA also contravenes the plain language of IRCA and this Court's opinion in *INS* v. *Pangilinan*, 486 U.S. 875 (1988), which reversed a similar action of the Ninth Circuit. In *Pangilinan*, certain citizens of the Philippines claimed eligibility for naturalization under a special statutory program that had expired in 1946. See *id.* at 877-880. The applicants in *Pangilinan* argued that the tardiness of their applications should be excused in order to remedy circumstances that prevented a timely filing: for a certain period of time the United States had not stationed an officer in the Philippines with authority to receive applications.

[19] In her dissent from denial of rehearing en banc in *Ayuda*, Judge Wald, joined by Chief Judge Mikva and Judges Edwards and Ruth Ginsburg, noted the square conflict between *Ayuda* and the decision in these cases. 958 F.2d 1089 (1992) (noting that the Ninth Circuit "ha[s] interpreted *McNary* in just the opposite way" from *Ayuda*).

See *id.* at 879-880. The Ninth Circuit held that the withdrawal of authority to receive applications was unlawful and that naturalization of the applicants would be an appropriate equitable remedy. *Id.* at 882.

This Court reversed. Responding to the notion that the judicially fashioned relief represented an appropriate exercise of the federal courts' equitable powers, this Court explained that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." 486 U.S. at 883-884. More fundamentally, such a remedy was inappropriate because it violated the strict terms of the statute authorizing naturalization. The Court firmly noted: "[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law." *Id.* at 883 (citations and internal quotation marks omitted).

This case is on all fours with *Pangilinan*. Just as in *Pangilinan*, the Ninth Circuit's response to errors in the implementation of a statutory immigration program has been to issue an order requiring INS to ignore the express statutory deadlines that Congress enacted. The statute plainly provides that relief is available only to individuals who "apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General" and states flatly that "[n]o denial of adjustment of status * * * based on a late filing of an application * * * may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." Yet, in 1992,

more than *five years* after November 6, 1986, INS is still receiving applications pursuant to the Ninth Circuit's order.

The Ninth Circuit's attempts to distinguish *Pangilinan* are unavailing. First, it argued (App. 16a-17a) that *Pangilinan* was not controlling because "the remedy ordered by the district courts here is not naturalization." App. 16a. This argument blinks at reality. The district courts have ordered INS to consider a group of applications identified as having a single disqualifying defect and to excuse that defect. This means that INS must grant these applications, which in turn entitles the applicants to lawful residency status.[20] Under this reading, any court can evade the substantive import of *Pangilinan* simply by recrafting the terms of its order; the *Pangilinan* court, for example, could have ordered INS to consider the Philippine applications without regard to their lack of timeliness. There is nothing in this Court's legal analysis that would permit such circumvention of the statutory deadline.[21]

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[20] Nor is it relevant that the relief offered by IRCA is lawful residency, rather than full naturalization. Congress's power to determine which aliens will be permitted lawful residence in this Nation is just as plenary as its power to determine which aliens will be permitted to become citizens.

[21] The Ninth Circuit suggested that this Court's decision in *McNary* supported the relief issued here, noting that the *McNary* Court stated that its ruling would allow aliens "to have their case files reopened and their applications reconsidered." App. 17a (quoting *McNary*, 111 S. Ct. at 898). The critical difference, of course, is that the order affirmed by this Court in *McNary* commanded INS to reconsider under proper procedures applications that had been filed in a timely manner. The Ninth Circuit's opinion orders INS to consider untimely applications in defiance of the express, statutory requirements for granting an application.

The Ninth Circuit also suggested that the relief issued here was appropriate because "in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress." App. 17a. It should go without saying that the Ninth Circuit's concept of the public policy established by Congress cannot serve as a basis for judicially altering the precise time deadlines established by Congress. If Congress had intended to permit waivers and extensions, it would have said so. Instead, Congress said that there could be *no* judicial review of INS decisions rejecting untimely applications, 8 U.S.C. 1255a(f)(2)—hardly the terms Congress would use if it intended to permit court-imposed waivers of the cutoff.

The Ninth Circuit next attempted to distinguish *Pangilinan* by noting that the deadline violated by the Ninth Circuit in *Pangilinan* had appeared in the statute itself; by contrast, the court asserted, IRCA does "not provide a specific cutoff date for amnesty applications." App. 18a. This assertion is incorrect. Section 1255a(a)(1)(A) required the application period to end on the last day of a twelve-month period beginning "not later than 180 days after November 6, 1986." Although the Attorney General could have acted to secure an earlier termination date of the program, he had no authority whatsoever to extend the program beyond the date he set. See note 1, *supra*. The extension ordered by the court of appeals cannot be reconciled with the plain language of Section 1255a.

Finally, the court of appeals contended that *Pangilinan* did not apply here because of post-enactment legislative history suggesting that Congress believed that the courts had the power to extend the deadline. App. 18a-19a. This analysis is doubly flawed. Reli-

ance on such materials to justify alteration of the precise deadline contained in IRCA flatly ignores this Court's statement that the "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); see *id.* at 118 n.13. What is more, the views of individual Members of Congress (even if contemporaneous with the consideration and passage of the measure) scarcely rise to the level of the Congress itself, which is structurally restrained in the creation of law by the features of Bicameralism, majority-vote requirements, and the Presentment Clause.[22] See *INS* v. *Chadha*, 462 U.S. 919, 944-951 (1983).

3. The issues presented are of substantial importance and plenary review by this Court is needed. As we have indicated, the Ninth Circuit's decision squarely conflicts with the D.C. Circuit's holding in *Ayuda* and this Court's analysis in *Pangilinan*. Moreover, the Ninth Circuit's ruling has a dramatic impact on a significant statutory program. The district courts' orders extending the deadlines already have required INS to accept 300,000 applications that otherwise would have been untimely under the terms

[22] In any event, it is doubtful that the legislative history establishes that Congress thought the deadline could be extended. The court cited the statement of *one* Senator showing his belief that courts could extend the deadline. App. 19a. Other members of the Senate voiced their belief that the statutory deadline was final. See, *e.g.*, 134 Cong. Rec. 9296-9297 (1988) (remarks of Sen. Simpson); *id.* at 9292-9293 (remarks of Sen. Gramm). Accordingly, it is seriously misleading to attribute to the entire Congress a belief suggested only by the isolated remark of a single legislator discussing a subsequent bill that never became law.

of Section 1255a(a). See App. 82a-83a.[23] Even though INS has not yet adjudicated the merits of these applications, receiving and administering them for five years beyond the statutory cutoff has substantially increased the costs of this program. Further, if the ruling stands, INS will be compelled to examine on an individual basis more than 300,000 applications to consider whether their failure to seek relief in a timely manner was caused by INS's invalid regulations. This is precisely the type of diversion of administrative resources that the filing deadline and the related preclusion of judicial review were designed to avoid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[23] The 300,000 applications filed under the order in this case work a substantial expansion of the program ordered by Congress, which resulted in 1.9 million applications filed in a timely manner. See App. 85a.

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